Chan Wey Siong v Pantas Wangsa Sdn Bhd & Anor

HIGH COURT (MUAR) — CIVIL SUIT NO 22–33 OF 2005
UMI KALTHUM JC
5 APRIL 2010

Contract — Breach — Damages — Liquidated damages — Whether terms in preamble to contract part of contract — Intention of parties — Liability of guarantor

By an agreement dated 7 June 2001, the first defendant agreed to appoint the plaintiff its sole agent to extract and sell timber logs from a concession area. The plaintiff in return agreed to pay the first defendant RM1.3m. The preamble to the agreement (cll 4 and 5) required the first defendant to obtain the timber extraction licence and necessary consent and/or approval within five months from the date of the agreement, viz on or before 6 November 2004. The second defendant — the director of the first defendant — guaranteed the due performance of the terms and obligations of the agreement by the first defendant. The plaintiff paid the RM1.3m and the defendants admitted to receiving the same. However, the plaintiff claimed that the first defendant failed to obtain the licence and consent and/or approval and thus terminated the agreement. The plaintiff filed the instant suit to recover the RM1.3m and other consequential losses and damages from the defendants.

Held, allowing the plaintiff's action with costs:

(1) The first defendant had indeed failed to obtain the licence and the consent and/or approval by 6 November 2004 (see para 8).

(2) Clauses 4 and 5 of the preamble were part and parcel of the terms and conditions of the said agreement. Taking the provisions of the preamble together with the 'body' of the agreement, the intention of both parties was that the preamble ought to be part and parcel of the terms and conditions of the agreement (see para 10).

(3) The first defendant had breached cl 3(a) and (b) of the agreement. Since cl 3(b) provided for a liquidated damages clause, and since the first defendant had breached the clause, the first defendant was liable to pay the plaintiff the sum of RM1,950,000 on the basis of s 75 of the Contracts Act 1950 and the Federal Court case of *Johor Coastal Development Sdn Bhd v Contrajaya Sdn Bhd* [2009] 3 MLJ 349 (see para 16).

(4) The first defendant had breached cll 4 and 5 of the preamble and cl 3(a) and (b) of the agreement. It followed that the second defendant, being the person who had personally guaranteed the due performance of the terms of the agreement by the first defendant, was liable to the plaintiff for the breaches as well. The second defendant was jointly and severally liable to pay the plaintiff the moneys the first defendant was ordered to pay (see paras 18 & 20).

[Bahasa Malaysia summary

Melalui perjanjian bertarikh 7 Jun 2001, defendan pertama bersetuju untuk melantik plaintif sebagai satu-satunya ejen untuk menebang dan menjual kayu balak daripada kawasan konsesi. Plaintif sebagai balasan bersetuju membayar defendan pertama RM1.3 juta. Mukadimah perjanjian (klausa 4 dan 5) mengkehendaki defendan pertama mendapatkan lesen menebang kayu balak dan izin yang perlu dan/atau kelulusan dalam masa lima bulan dari tarikh perjanjian iaitu pada atau sebelum 6 November 2004. Defendan kedua — pengarah defendan pertama — menjamin pelaksanaan terma-terma kewajipan perjanjian oleh defendan pertama. Plaintif membayar RM1.3 juta dan defendan-defendan mengaku menerimanya. Walau bagaimanapun, plaintif mendakwa bahawa defendan pertama gagal untuk mendapatkan lesen dan izin dan/atau kelulusan dan oleh itu menamatkan perjanjian tersebut. Plaintif memfailkan tindakan ini untuk mendapatkan kembali RM1.3 juta dan kerugian penting yang lain dan ganti rugi daripada defendan-defendan.

Diputuskan, membenarkan tindakan plaintif dengan kos:

(1) Defendan pertama sememangnya gagal untuk mendapatkan lesen dan izin dan/atau kelulusan pada 6 November 2004 (lihat perenggan 8).

(2) Klausa 4 dan 5 mukadimah adalah bahagian penting daripada terma-terma dan syarat-syarat perjanjian tersebut. Mengambilkira peruntukan-peruntukan mukadimah bersama dengan 'bahagian utama' perjanjian, niat kedua-dua pihak adalah bahawa mukadimah tersebut patut menjadi sebahagian penting terma-terma dan syarat-syarat perjanjian tersebut (lihat perenggan 10).

(3) Defendan pertama telah memungkiri klausa 3(a) dan (b) perjanjian tersebut. Memandangkan klausa 3(b) memperuntukkan klausa ganti rugi jumlah tertentu, dan memandangkan defendan pertama telah memungkiri klausa tersebut, defendan pertama bertanggungjawab untuk membayar plaintif jumlah RM1,950,000 berikutan s 75 Akta Kontrak 1950 dan kes Mahkamah Persekutuan *Johor Coastal Development Sdn Bhd v Contrajaya Sdn Bhd* [2009] 3 MLJ 349 (lihat perenggan 16).

(4) Defendan pertama telah memungkiri klausa 4 dan 5 mukadimah dan klausa 3(a) dan (b) perjanjian tersebut. Oleh itu, memandangkan defendan kedua sebagai seorang yang menjamin secara peribadi pelaksanaan terma-terma perjanjian tersebut oleh defendan pertama, dia juga bertanggungjawab terhadap plaintif untuk kemungkiran-kemungkiran tersebut. Defendan kedua secara bersesama dan berasingan bertanggungjawab untuk membayar kepada plaintif wang yang diarahkan untuk dibayar oleh defendan pertama (lihat perenggan 18 & 20).]

Notes

For cases on breach, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2644–2670.

Cases referred to

Johor Coastal Development Sdn Bhd v Contrajaya Sdn Bhd [2009] 3 MLJ 349, FC (refd)

Legislation referred to

Contracts Act 1950 s 75
National Forestry Act 1984 ss 2, 21, 21(3), Part IV Chapter 2

Mohd Radzi bin Yatiman (Rahim & Lawrnee) for the plaintiff.
Parthiban a/l MN Letchumanan (L Parthiban, Zulkiflee & Associates) for the defendants.

Umi Kalthum JC:

THE CLAIM

[1] The plaintiff in his writ of summons and statement of claim in encl 47, P1 is claiming from the defendants:

(a) the sum of RM3,250,000;

(b) interest on the said sum at the rate of 8%pa beginning from the date of filing of this action, that is, 27 April 2005; and

(c) costs.

THE FACTS

[2] Based on the agreed facts P8:

(a) the plaintiff and the first defendant had entered into an agreement dated 7 June 2004 ('the said agreement') (P2, pp 1–7). The main terms of the said agreement are:

A

(i) the plaintiff was appointed as the sole and exclusive agent to remove, extract and sell all the timber logs in an area known as Blok A Projek Ladang Hutan Yayasan Kelantan at Hutan Simpan Jentiang
B comprising an area of approximately 404.8 hectares ('the concession area') in consideration of the plaintiff paying the first defendant RM1.3m in advance;

(ii) the plaintiff did pay to the first defendant through the second defendant the sum of RM1.3m at the time the said agreement was
C executed and the defendants had admitted to its receipt ('the advancement');

(iii) vide cl 4 of the said agreement, the second defendant, who was the director of the first defendant had jointly and severally personally
D guaranteed to the plaintiff the due performance of the terms and obligations of the said agreement by the first defendant;

(iv) it is a term of the agreement that the first defendant shall obtain timber log extraction licence ('the licence') and consent/approval
E appointing the plaintiff as agent to sell the timber logs within a period of five months beginning from the date of the said agreement, that is, on or before 6 November 2004 (para 6 of P8; cll 4 and 5, preamble to said agreement).

F **[3]** In the preamble to the said agreement, it was further stated that pursuant to a letter of approval dated 30 May 2004 (P4, pp 1–3) from Jabatan Perhutanan Negeri Kelantan ('JPN') addressed to the first defendant, the JPN had given its approval to the first defendant to log, extract and remove timber from the concession area. It was also stated that the first
G defendant was currently in the process of applying for a licence from the relevant authority for logging and extraction of timber logs permitted under the licence within the concession area and the first defendant shall procure the issuance of the licence within five months from the date of the said agreement.

H

[4] It was the plaintiff's case that the first defendant had failed to obtain the licence and the consent to appoint the plaintiff as agent within the said period of five months. The plaintiff had through his solicitors sent a letter dated 28 January 2005 (P2, p 8) to the defendants informing the defendants of their
I obligation to obtain the licence and the consent/approval for the plaintiff to sell the timber logs extracted from the concession area and of the expiration of the five month period with no licence and consent/approval having been obtained by the defendants. This letter then requested the defendants to let the plaintiff know about the status of the licence application within seven

days. Failure to do so the plaintiff gave notice to the defendants that he would be exercising his rights to terminate the said agreement and demand the refund of the advancement and other consequential losses and damages from the defendants. As no response was forthcoming, the plaintiff's solicitors then sent a letter dated 17 February 2005 (P2, p 10) to the defendants giving notice to them that their client/plaintiff had terminated the said agreement. The plaintiff then filed this suit where he claimed the sum of RM3,250,000 from the defendants calculated as follows:

(a) the refund of RM1.3m advancement; and

(b) 11/2 of the advancement under cl 3(b) of the said agreement which is RM1,950,000.

[5] The defendants contended that they had not breached cll 4 and 5 of the preamble to the said agreement as they had obtained the licence and the consent/approval for the logging concession within the stipulated time of five months from the Director of JPN on 30 May 2004 (P4, pp 1–3) followed by a letter of approval dated 3 August 2004 (P4, pp 4–5). Unknown to the defendants, the approval obtained by them was cancelled by the Director of JPN around 10 January 2005 and the approval was instead given to a third party, that is Yayasan Kelantan Darulnaim ('YAKIN'). The defendants had filed an Application for Judicial Review No 25–17 of 2006 dated 10 August 2006 at the High Court at Kota Bharu ('the application') to quash the said decision of the JPN. The application is still pending. The defendants alleged that the plaintiff knew of these developments as the second defendant had informed him and had in fact accompanied the first defendant to discuss the matter with the JPN. The defendants denied receiving the plaintiff's solicitors' letters dated 28 January 2005 and 17 February 2005. The defendants also denied that they owed the plaintiff the sum of RM3,250,000, in particular the application of cl 3(b) of the said agreement.

THE ISSUES

[6] There are several issues raised by the parties as follows:

(a) whether the defendants had obtained the licence;

(b) whether the letters dated 30 May 2004 and 3 August 2004 amounted to the licence;

(c) whether cll 4 and 5 of the preamble of the said agreement can be construed as terms and conditions of the said agreement and whether the first defendant had breached these clauses;

(d) whether the first defendant is liable to the plaintiff for the sum of RM1,950,000 under cl 3(a), (b) of the said agreement and the sum of RM1.3m advancement; and

(e) whether the second defendant had breached cl 4 of the said agreement and as such liable to pay the sum of RM3,250,000 to the plaintiff.

Whether the defendants had obtained the license — whether letters dated 30 May 2004 and 3 August 2004 amounted to the license

[7] As these two issues are interlinked, I will deal with them together. It is the defendants contention that these two letters constitute the licence, whereas it is the contention of the plaintiff that they are not the licence envisaged in cl 5 of the preamble to the said agreement. In this, I agree with the position taken by the plaintiff. This is because:

(a) if the 30 May 2004 letter is the licence, then why was there the need by the parties to differentiate it by referring specifically to this letter in cl 1 of the preamble as the 'letter of approval' and then went on to provide in cl 5 of the preamble as follows:

> The First Party (meaning the 1st Defendant) is currently in the process of applying for a forest licence from the relevant authority for logging and extraction of timber logs permitted under the Licence within the Timber Concession ('the Licence') and the First Party shall procure the issuance of the Licence within five (5) months from the date of this Agreement.

It is obvious to me that the 30 May 2004 letter cannot constitute the licence, for if it was so there was no need to provide further the said cl 5 of the preamble;

(b) having perused the 30 May 2004 letter, I find that it is nothing but an approval letter, approving the first defendant's application to 'membuka kawasan Blok A Projek Ladang Hutan Yayasan Kelantan Darulnaim ... di Hutan Simpanan Kekal Jentiang ... adalah diluluskan sebagaimana pelan berkembar dengan syarat dan bayaran seperti berikut:'. After which there followed a list of payments to be made. Amongst the five items listed thereunder, item (e) was for 'Bayaran Lesen: RM400' and item (f) was for 'Bayaran Proses: RM200' — see para 2. What is even more revealing are paras 3 and 4 which followed para 2 as follows:

> 3. Sekiranya tuan bersetuju dengan perkara-perkara dinyatakan di atas, sila kembalikan *borang jawapan* berkembar yang telah diisikan dengan lengkap beserta bayaran penuh ke pejabat ini dalam *tempoh satu (1) bulan dari tarikh surat ini. Sekiranya Jabatan tidak menerima bayaran dalam tempoh yang ditetapkan kelulusan ini dengan sendirinya terbatal.*

> Sila ambil perhatian bahawa *proses penyediaan lesen telah bermula dengan keluarnya surat tawaran ini dan akan hanya diteruskan apabila kesemua bayaran di atas telah dijelaskan*. Di samping itu, sekiranya berlaku kesalahan hutan *semasa lesen berkuatkuasa* Jabatan ini boleh membatalkan keluiusan lesen ini dengan serta merta dan pihak tuan, kontraktor dan pekerja tuan akan disenarai hitamkan.
>
> (Emphasis added.)

Paragraphs 3 and 4 of the said letter made it crystal clear the intention of the Director of Forestry, Kelantan was to inform the first defendant what was needed to be done by it in order for it to be issued with the licence. This letter moreover cannot amount to the licence since the first defendant was required to fill the answer form and if the itemised payments were not made within one month from the date of the said letter the approval would have been cancelled. Paragraph 4 also merely emphasised the fact that 'proses penyediaan lesen' had only begun with the issuance of the said letter but would only be proceeded with when all the said payments had been received by the forestry department;

(c) as for the 3 August 2004 letter, the contents of this letter essentially referred back to the 30 May 2004 letter and was basically to remind and warn the first defendant of its obligations to make the various full payments referred to in the 30 May 2004 letter. In para 2 of the 3 August 2004 letter, the Director of Forestry, Kelantan stated:

> ... dan *tuan telah menjelaskan sebahagian bayaran* bagi kompartmen 4 dan kompartmen 5 (sebahagian) Hutan Simpan Kekal Jentiang seluas 404.8 hektar ...
>
> (Emphasis added.)

The director then went on to give details of the part payment made by the first defendant. In the last paragraph of the said letter, the director stated as follows:

> *Tuan belum menjelaskan* deposit lading sebanyak RM336,800.00 dan pampasan hutan sebanyak RM421,000.00 bagi kompartmen 4 yang berjumlah RM757,800.00. Bagi kompartmen 5 deposit ladang RM472,888.00 dan pampasan hutan sebanyak RM591,000.00 juga belum tuan menjelaskan. Sehubungan dengan itu *tuan dikehendaki menjelaskan deposit ladang dan pampasan hutan bagi 2 kompartmen tersebut sebanyak RM1,821,600.00 dalam masa satu bulan daripada tarikh surat ini, jika tidak surat kelulusan akan dibatalkan*.
>
> (Emphasis added.)

The above paragraph was obviously a warning to the first defendant that it faced the real possibility of even the approval being cancelled for failure to make full payments as stipulated in the 30 May 2004 letter;

(d) taking into account both said letters together, I still cannot see how these two letters could be construed as amounting to the licence as alleged by the first defendant as having been obtained by it in fulfillment of the provisions of cl 5 of the preamble. Their meaning is plain for all to see;

(e) as the first defendant had failed to make the outstanding payments as required, the Director of Forestry, Kelantan had, vide his letter to the Director of YAKIN ref PHN.KN.200/1/391/(58) dated 10 January 2005 and carbon copied to the first defendant, informed the first defendant that the earlier department's letters of approval reference number '(41) dlm.PHN.KN.200/1/391 bertarikh 4.4.2004 dan *bil (43) dlm PHN.KN.200/1/391 bertarikh 30.5.2004 adalah dibatalkan*'. So by 10 January 2005, even the approval obtained by the first defendant was cancelled;

(f) the two said letters of 30 May 2004 and 3 August 2004 could not, moreover be the licence since under the National Forestry Act 1984 (Act 313), (adopted by the State of Kelantan as of 1 January 1986) a licence under the said Act has been defined in s 2 as:

> lesen 'ertinya suatu lesen yang dikeluarkan di bawah Bab 2 Bahagian IV';

Section 21 of the said Act is in Chapter 2 of Part IV where it provides for the period, condition and form of a licence. Section 21(3) states that every licence shall be in *Form 1*. Form 1 as provided in the Act is certainly not in the form of the two said letters. I wish to express my appreciation of learned counsel for the plaintiff for doing his research on this aspect and it puts paid to the defendants' contention.

[8] I therefore find that the first defendant had failed to obtain the licence referred to in cl 5 of the preamble to the said agreement by 6 November 2004. Not only that, the first defendant also had the approval granted vide 30 May 2004 letter cancelled by the director of forestry. As a corollary to this issue, the first defendant had also failed to obtain the necessary consent/approval to appoint the plaintiff as agent within the same stipulated period. This was not contested by the defendants. In any case, there was nothing in the two said letters which made any reference to this issue of consent/approval to appoint the plaintiff as agent.

Whether cll 4 and 5 of the preamble to the said agreement can be construed as terms and conditions of the said agreement and whether the first defendant had breached these clauses

[9] Learned counsel for the defendants submitted that cll 4 and 5 are only in the preamble of the said agreement and as such they can only be construed

as mere statements or representations and not conditions precedent for the first defendant to comply with or impose legal obligations to complete the performance of the said agreement. That the plaintiff's claim that the first defendant had breached the terms and conditions of these two clauses is wrong and misconceived. Learned counsel then concluded that the said agreement is still binding and existing and that the termination notices dated 28 January 2005, 17 February 2005 and 14 March 2005 at pp 8–16 of P2 are invalid, premature, wrongly issued and not binding on first defendant. As the first defendant has not breached the condition precedent of the said agreement, there is no breach of contract and therefore no cause of action against the first and second defendants, wherefore the plaintiff's case must be dismissed with costs.

[10] On this issue I am again with the plaintiff, that is, that cll 4 and 5 of the preamble are part and parcel of the terms and conditions of the said agreement. To construe otherwise would lead to an absurd situation where the plaintiff would have already paid RM1.3m to the first defendant as an advancement and being made to wait on his rights to extract and sell timber logs from the concession area on mere 'representations' by the first defendant to obtain the licence and the approval/consent for the plaintiff to be appointed as agent of the first defendant. I am of the view that taking the whole provisions of the preamble together with the 'body' of the said agreement, the intentions of both parties were that the preamble is part and parcel of the terms and conditions of the said agreement. This is because:

(a) the said agreement would not have been entered into without the approval letter dated 30 May 2004 referred to in cl 1 of the preamble. This letter is not referred to in the body of the said agreement. Clause 1 also described the concession area and made reference to the 'Location Plan annexed as 'Plan A' hereto'; again this is not referred to in the body of the said agreement;

(b) the first defendant's obligation to obtain the necessary consent/approval from the relevant authorities to authorise the plaintiff to sell the timber logs extracted from the concession area in cl 4 and the first defendant's appointment of the plaintiff to sell the timber logs in the concession area 'upon the terms and conditions hereinafter contained' in cl 6 of the preamble are also not provided in the body of the said agreement, but which are obviously necessary provisions as precursor to the provisions of the body of the said agreement;

(c) the clear and positive language used in cll 2–7 of the preamble convey the firm intentions and commitment of both parties to their contractual obligations;

(d) clauses 8 and 9 of the body of the said agreement reflect the provisions of cll 1, 3, 4–7 of the preamble when it stipulated as follows:

8. The parties hereto hereby covenant and agree to execute such other and further documents or instruments as are or may in the future become necessary for the effective and properly observance and performance of the respective parties of the terms and conditions herein contained.

9. The parties hereto recognise that it is impracticable to make provisions for every contingency that may arise in the course of performance of the provisions hereof *and accordingly declare their intention that this Agreement shall operate between them with fairness and without detriment to the interest of any party and covenant and agree with each other that they shall use their best endecuvours to ensure that full effect be given to the terms of this Agreement in the spirit in which it was agreed.*

(Emphasis added.)

(e) the testimony of the plaintiff (SP1) clearly showed his understanding that cll 4 and 5 of the preamble are the conditions of the said agreement which must be performed by the first defendant on or before 6 November 2004 — see his answers to questions 5–8, P7A;

(f) the testimony of the second defendant also showed the understanding of the first defendant to be the same as the plaintiff. In his witness statement D11, the second defendant (SD1) stated as follows:

4. *Sila terangkan kepada Mahkamah mengenai Perjanjian bertarikh 7.6.2004 yang kamu katakan di atas tadi?*

Perjanjian bertarikh 7.6.2004 tersebut adalah merupakan satu Perjanjian yang dimasuki oleh Plaintif dengan Defendan Pertama dan saya, sebagai Penjamin kepada Defendan Pertama, di mana Defendan Pertama telah melantik Plaintif sebagai agen untuk menjual kayu-kayu balak yang bakal diekstrak dari satu konsesi balak yang dikenali sebagai Blok A Projek Ladang Hutan Yayasan Kelantan di Hutan Simpan Jentiang seluas 404.8 hektar atas balasan Plaintiff membayar wang sebanyak RM1.3 juta kepada Defendan Pertama.

7. *Merujuk kepada Terma di Klausa 5 Perjanjian tersebut ada menyatakan bahawa 'The First Party is currently in the process of applying for a forest license from the relevant authority for logging and extraction of timber logs permitted under the License within the Timber Concession ('the License') and the First Party shall Procure the issuance of the License within five (5) months from the date of this Agreement'. Soalan saya adalah, adakah Defendan Pertama telah mendapat lesen seperti mana yang dinyatakan dalam Klausa 5 Perjanjian tersebut?*

Ya, Defendan Pertama telah pun mendapat lesen seperti yang dimaksudkan dalam Klausa 5 Perjanjian tersebut sebelum tamat tempoh 5 bulan daripada tarikh Perjanjian tersebut. Tempoh sebelum tamat 5 bulan tersebut adalah 6.11.2004. Kelulusan tersebut telah pun diberikan oleh Jabatan Perhutanan Negeri Kelantan melalui surat mereka kepada Defendan Pertama bertarikh 30.5.2004 dan disusuli surat selanjutnya oleh Jabatan Perhutanan Negeri Kelantan bertarikh 3.8.2004.

It appears to me that learned counsel for the defendants was clutching at straws when he tried to argue that the clauses in the preamble are mere statements or representations when he himself had posed the above question to the second defendant by referring to the 'Terma di klausa 5 perjanjian tersebut'. In fact, I find that there is a serious contradiction in the defendants' approach to the first two issues on whether or not the two letters dated 30 May 2004 and 3 August 2004 constitute the said licence under cl 5 of the preamble of the said agreement as against their approach to the third issue. In the two earlier issues, the defendants' approach had been that the said cl 5 is a condition of the contract, whilst in the third issue they took the opposite position on the same cl 5 by denying it to be a condition of contract; and

(g) over and above that, both parties had agreed in their agreed facts P8 that it is a term of the said agreement that the first defendant shall obtain timber log extraction licence and consent/approval appointing the plaintiff as agent to sell the timber logs within a period of five months from the date of this said agreement. It is trite law that a party cannot approbate and subsequently reprobate when circumstances are not in his favour. The defendants are therefore prevented from changing their position on this issue at will.

[11] I therefore find the defendants' submissions on this issue as being devoid of merit.

Whether the first defendant is liable to the plaintiff for the sum of RM1,950,000 under cl 3(a), (b) of the said agreement and the sum of RM1.3m advancement

[12] I will deal with the advancement sum of RM1.3m first. Since the first defendant had failed to fulfill his part of the bargain under cll 4 and 5 of the preamble by the dateline of 6 November 2004 (and to date) I find that the first defendant is liable to return the said advancement sum to the plaintiff.

[13] With regard to the sum of RM1,950,00 under cl 3(a), (b) of the said agreement, the said clause provides as follows:

3

(a) *The First Party* (1st Defendant) *shall not in any way prejudice the Second Party* (the Plaintiff) due and proper performance and observance of its obligations herein contained.

(b) *The First Party shall not* surrender or assign or sell or appoint *or deal with any other parties* whether individual or body corporate *in respect of the said Concession Area so as to prejudicially undermine the rights and proper observance and performance of the Second Party's obligations herein contained.* In the event of breach of this condition then the First Party shall be liable

A to pay the Second Party the sum of money equivalent to one and a half (1 1/2) of the Advancement received by the First party from the Second Party hereinunder.

B **[14]** It is the plaintiff's case that the first defendant had acted prejudicially against his interests under the said cl 3 when:

(a) the defendants did not respond to his solicitor's letter dated 28 January 2005 and 17 February 2005;

C (b) the first defendant failed to make full payment of the sums enumerated in the Director of Forestry, Kelantan's letter dated 30 May 2004 and 3 August 2004 within the period stipulated in the said letters leading to the cancellation of the approval vide the director of forestry's letter dated 10 January 2005;

D (c) after the cancellation of the approval, the defendants had continued with their relationship with YAKIN and carried on the logging activities on the same concession area with YAKIN and thereby prejudicing the plaintiff's interests. At this juncture I note the second defendant's testimony during cross-examination where learned counsel for the E plaintiff had referred to his answer to question No 19 of his witness statement D11 and asked him the following questions to which he answered as follows:

F Q: On Joint Venture Agreement and Shareholders Agreement dated 24.8.2002. Was the Defendant (1) awarded a logging concession in the same area as Hutan Jentiang under the Joint Venture Agreement?

A: Yes.

Q: The Joint Venture at the same area between Yayasan Kelantan Darulnaim and Defendant (1) is still being carried out from beginning until now?

G A: Yes.

[15] The defendants contended that they did not breach the terms of cl 3(b) as they did not surrender or assign or sell or appoint or deal with any H other parties in respect of the concession area other then the plaintiff. The cancellation of the so-called 'licence' obtained by the first defendant and the issuance of a new 'license'/concession to YAKIN by the state forestry department was not within the defendants knowledge nor with the first defendant's consent and therefore the defendants are not liable for the I unlawful act of the state forestry department when it revoked the said 'licence'.

[16] Based on the matters enumerated in para 14 above, I agree with the plaintiff and find that the first defendant had breached cll 3(a) and (b) of the said agreement. The second defendant's answer during cross-examination clearly showed that the first defendant has direct dealings with YAKIN in the same concession area despite the revocation of the so called 'licence'/approval. Since cl 3(b) has provided for a liquidated damages clause, and since the first defendant had breached this clause, I rule that the first defendant is liable to pay the plaintiff the sum of RM1,950,000. I do so by taking into account s 75 of the Contracts Act 1950 and the Federal Court case of *Johor Coastal Development Sdn Bhd v Contrajaya Sdn Bhd* [2009] 3 MLJ 349.

Whether the second defendant had breached cl 4 of the said agreement and as such liable to pay the sum of RM3,250,000 to the plaintiff

[17] It is the contention of the second defendant that he did not breach cl 4 of the said agreement as the first defendant did not terminate the said agreement nor enter into any agreement or contract for the sale of the timber logs from the concession area with any other person. That since the first defendant did not breach the said agreement and there is no cause of action against the first defendant, similarly the second defendant as guarantor is also not liable to the plaintiff. Also, it was argued that the law of guarantee was not complied with and therefore the second defendant's personal guarantee is not valid and ill conceived and the plaintiff's claim against him should be dismissed.

[18] Clause 4 of the said agreement provides as follows:

> 4. The First Party hereby undertakes not to terminate this Agreement or enter into any agreement or contract for the sale of the timber logs from the said Concession Area with any other person or persons *and the performance of the covenants herein by the First Party is to be guaranteed personally by TOO CHOO SIEW* (NRIC. 600101-08-7985) *of No. 1, Jalan Kemuncak 6, Taman Nong Chik, 80200 Johor Bahru who shall be liable personally against the claim of the Second Party.*

(Emphasis added.)

The submission of the second defendant conveniently ignored the phrase 'and the performance of the covenants herein by the first party'. As I have found that the first defendant had breached the provisions of cll 4 and 5 of the preamble and cll 3(a) and (b) of the said agreement, it follows that the second defendant, being the person who had personally guaranteed the due performance of the terms of the said agreement by the first defendant, is liable to the plaintiff for these breaches as well. And since I have found that the first defendant must pay to the plaintiff the sums of RM1.3m and RM1,950,000, I now find that the second defendant is also jointly and severally liable to pay the same to the plaintiff.

[19] In doing so I find that the plaintiff through his solicitors, had duly sent the letters of enquiry dated 28 January 2005 (P2, pp 8–9), of termination dated 17 February 2005 (P2, p 10) and of claim dated 14 March 2005 (P2, p 12). All these letters were sent by AR registered post, and in respect of the last two letters they were sent also by certificate of posting. The addresses displayed on these letters were to the first defendant and at its registered address as stated in the said agreement and to the second defendant at his address in Johor Bahru as provided under cl 4 of the said agreement.

CONCLUSION

[20] Based on the evidence adduced by the plaintiff and the defendants and the documents tendered into court I find that the first defendant had breached the said agreement and therefore both the first and second defendants are severally and jointly liable to pay to the plaintiff the following:

(a) the return of the advancement of RM1.3m;

(b) damages for the sum of RM1,950,000;

(c) interest on the sums of RM1.3m and RM1,950,000 at the rate of 8%pa from the date of this action being filed till the date of realisation; and

(d) costs to be taxed.

Plaintiff's action allowed with costs.

Reported by Andrew Christopher Simon